***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

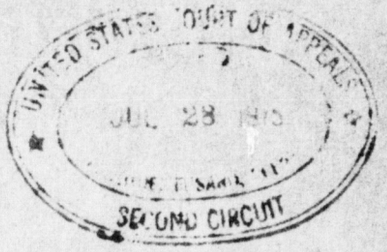
ORIGINAL WITH PROOF OF SERVICE

# 75-4018

## UNITED STATES COURT OF APPEALS

*for the*

## SECOND CIRCUIT




——No. 75-4018——

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

- against -

MARTIN A. GLEASON, INC., and GUTTERMAN FUNERAL HOME, INC.,

Respondents.

——No. 75-4045——

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

- against -

LOCAL 100, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Respondent.

——No. 75-4047——

J.N. GARLICK FUNERAL HOMES, INC., and MARTIN A. GLEASON, INC.,

Petitioners,

- against -

NATIONAL LABOR RELATIONS BOARD and LOCAL 100, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Respondents.

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On Application for Enforcement and Petition for Review of Two Orders of the National Labor Relations Board

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BRIEF FOR MARTIN A. GLEASON, INC. AND GUTTERMAN FUNERAL HOME, INC., RESPONDENTS, AND J.N. GARLICK FUNERAL HOMES, INC. AND MARTIN A. GLEASON, PETITIONERS

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UNITED STATES OF AMERICA
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------No. 75-4018----------x

NATIONAL LABOR RELATIONS BOARD, :

Petitioner, :

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BRIEF FOR MARTIN A. GLEASON, INC. AND GUTTERMAN FUNERAL HOME, INC., RESPONDENTS, AND J.N. GARLICK FUNERAL HOMES, INC. AND MARTIN A. GLEASON, INC., PETITIONERS

## STATEMENT OF THE CASES

Martin A. Gleason, Inc. and Gutterman Funeral Home, Inc., as Respondents (Case No. 75-4018) and J. N. Garlick Funeral Homes, Inc. and Martin A. Gleason, Inc., as Petitioners (Case No. 75-4047), respectfully submit this Brief in reply to the Brief of the Petitioner-Respondent, National Labor Relations Board (hereinafter "Board"), in support of their Petition for Review.

Case Nos. 75-4018 and 75-4045 are before the Court upon application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, As Amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., 151, et seq.), for enforcement of orders issued by the Board. Case No. 75-4047 is before the Court on the Petitioner's Request for Review. They have been consolidated for purposes of argument, pursuant to a Stipulation for Consolidation, approved by the Court on April 4, 1975.

## BACKGROUND

### Preliminary Statement

Respondents are two of eighteen funeral companies,

which locked out their employees, represented by Local 100, SEIU, AFL-CIO (hereinafter "Union") when the Union struck three members of the multi-employer bargaining unit, of which they were a part.

Of the eighteen members, only the two Respondents, operating a total of four establishments, and one other employer were charged by the Union with unfair labor practices, based upon the lockout. The Board dismissed the charges against the third employer.

The gravamen of the charges and the Board's findings of violations of the Act are not the lockout; rather, the Board relies upon comments made by the Respondents at the time of the lockout, or thereafter, to impute an evil design upon the Respondents for having locked out its employees.

That the lockout itself would have been legal but for the specific circumstances to be reviewed below, is clear from the statements of the Counsel for the General Counsel, who prosecuted the case on behalf of the Board (A 27, fn. 23)[1]; from a reading of the Order (A 37-8) prohibiting the specific conduct found but not the lockouts themselves; as well as the failure of the Union to charge the other employers which locked out their employees at the same time and for the same reasons, and, of course, the dismissal of the charge against the third employer involved.

Respondents contend that under all of the circumstances, the record testimony fails to sustain the Board's finding that

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[1] "A" references are to the printed appendix.

the single utterance made by Respondent Gutterman, in informing two of its employees of the layoff, or the comments literally dragged out of Respondent Gleason, by two employees after the lockout, converted otherwise legal lockouts into illegal lockouts.

The Administrative Law Judge relied exclusively on what he found to be a "subtle" message in the Gutterman case (A 26-7), although there is no evidence that anyone involved understood it that way, and in the Gleason case, he found "pure logic" in what Gleason reluctantly did at the continued urging of his employees.

Notwithstanding the alleged "subtle" message and the logic, both Respondents are faced with huge back pay bills.

It is ludicrous, in the juxtaposition of the cases before the Court, that Respondents were ordered to pay back pay while the Union, Respondent in Case No. 75-4047, in the face of illegal threats to its members, coupled with a history of fines when members exercised their right to refrain from supporting the Union (A 29-30 fn. 28), was allowed over Petitioner's objection, to settle the case with a disclaimer of violation and no back pay for those employees coerced to continue to support the Union's strike.

Case No. 75-4018

For many years, the employers herein, together with other funeral establishments in the New York Metropolitan Area, have bargained with Local 100, SEIU, AFL-CIO, as a multi-employer

bargaining unit through the Metropolitan Funeral Directors Association, Inc. (hereinafter "Association") (A 6-7, 51, 60, 61). The only employees covered by these agreements are the licensed funeral directors, undertakers and embalmers, registered residents and trainees. The latter two categories refer to those who are in the process of becoming funeral directors, licensed by the State of New York. The term "licensed funeral directors" or "unit personnel" will be used interchangably to refer to the classification involved.[2]

In July, 1973, the Association was served with a notice by the Union, requesting a modification and amendment of the collective bargaining agreement which was scheduled to expire on October 9, 1973. During the ensuing weeks, the parties engaged in collective bargaining until October 12, 1973, when impasse was reached. At that point, the Union commenced picketing at three Association member locations with signs indicating that a strike was in progress.

On or about October 14, 1973, and for some time thereafter, 18 employee members of the Association initiated a lockout and informed their bargaining unit personnel that in response to the Union's selective strike, the employers felt they could not continue to employ them for the duration of the stoppage.

The three struck establishments employed a total of fourteen employees who were being supported by a strike assessment of

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[2] The terms undertakers and embalmers are no longer used and the only license granted by the State of New York is that of "Funeral Director", which encompasses all of the duties of the earlier titles.

$15.00 per week per employed licensed funeral director, the collection of which had commenced months before the strike. In contrast to the limited number of strikers at the three locations selected by the Union, the contributions of approximately 200 employees, whom the Union left on the job, could have permitted an indefinite continuation of the selective strike.

The Union's intent was to force the three struck employers to capitulate to their demands, destroying the Association's cohesive approach and creating a domino reaction. In order to counteract this "whipsaw" tactic, the Association members implemented a lockout to avoid a situation whereby the struck employers would suffer at the hands of their counterparts who continued to operate with employees whose wages were being funneled into a strike fund designed to perpetuate the strike.

Those funeral establishments which engaged in the "lockout" did so legally and for the sole purpose of bringing economic pressure to bear in support of their legitimate bargaining objectives, as well as to support their fellow members.

After a hearing, the Administrative Law Judge, on July 30, 1974, issued a decision (A 4), which was adopted by the Board on December 6, 1974 (A 45) and which found that Gutterman and Gleason violated Sections 8(a)(1) and (3) of the Act by locking out their licensed funeral directors and conditioning their return to work upon their resignation from the Union and further, that Gleason violated Section 8(a)(1) of the Act by requesting employees to furnish copies of statements which they had given

to the Board (A 36, 45).[3]

Case Nos. 75-4045 and 75-4047

On March 13, 1974, Gleason and J.N. Garlick Funeral Homes, Inc. filed unfair labor practice charges against the Union, alleging violations of Section 8(b)(1)(A) of the Act. The conduct complained of consisted of efforts by the Union to coerce and induce the employers' employees to maintain their membership in and continue their support of the Union by threatening them with fines and other penalties if they sought to resign or cross the Union's picket line.

After issuing a Complaint, and shortly before the date scheduled for hearing, the Board's General Counsel and the Union, over the objection of the charging parties, entered into a settlement stipulation, subsequently approved by the Board. The charging parties opposed the settlement because of its inclusion of a "Non Admissions" clause and its failure to provide a Back Pay remedy on behalf of employees who were intimidated and coerced by the Union's threats from exercising their right to resign and return to work.

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[3] Chairman Miller dissented from the Board's finding that Gleason's requests for statements violated the Act (A 45-6, n.2).

## ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDING THAT MARTIN A. GLEASON, INC. VIOLATED SECTIONS 8(a)(1) and (3) OF THE ACT BY LOCKING OUT THEIR LICENSED FUNERAL DIRECTORS AND CONDITIONING THEIR RETURN TO WORK UPON THEIR RESIGNATION FROM THE UNION

NO. 75-4018

A. The Martin A. Gleason, Inc. Case

As a result of the Union's implementation of a selective strike on October 12, 1973 against three members of the Association, Gleason, in concert with other members of the Association, decided to lock out its employees in order to avoid supporting a strike against the three Association members (A 7, 109-10, 118).

The sole purpose of this lockout was to bring economic pressure to bear in support of the Association's legitimate bargaining objectives and to counteract and blunt the impact of the Union's whipsawing tactics (A 8, 11, 110-12, 114-14a, 118).

On October 13, 1973, the day following the Union's strike, John Gleason, President of Martin A. Gleason, Inc., called funeral directors Frank Connelly, Sr., Robert Gallagher and Albert Phillips into his office to advise them that, as a result of the strike, the Association had decided to dismiss all employees and that he was doing so in order to defend his business (A 8, 11, 110, 111, 114-14a).

At this meeting, Gallagher expressed grave concern over the prospect of being out of work for any length of time and asked if there was anything he could do to continue working (A 114a, 118).

Later that day, after he had arrived home, Gallagher called Gleason to reaffirm his desire to continue working. Gleason again refused to discuss the issue and it was only after Gallagher persisted by voicing his discontent with the Union, indicating that he did not care whether he belonged to the Union or not, and expressly stated, "I don't want to be out of work because of this union-management disagreement...I will quit the union, I will get out of the union and go back to work as a non-union member", that Gleason advised him of the legal alternative which was available to him (A 115).

This sequence of events is crucial in establishing the lack of union animus which the Board has rather mystically found to be present in a set of facts and circumstances which clearly reflect just the opposite. Gallagher's plight, his cajoling and persistent pleading, set the scene for Gleason's acceptance of a suggestion which Gallagher had just made, to wit, his resigning from the Union. It was at this point that Gleason advised Gallagher that he could return to work after following through on his decision to resign from the Union, a decision which, as Gallagher testified, had been his alone. Contrary to the Board's implications, the seeds for that idea were not at all planted or cultivated by Gleason.

Similarly, Albert Phillips, who had also attended the

October 13th meeting in Gleason's office, confirmed the events of that meeting as previously set forth. Phillips, who was quite concerned about his financial situation, having recently purchased a home and undertaken a significant mortgage obligation, asked what the alternatives were. As Gallagher's and Phillips' testimony confirms, Gleason refused to discuss whether any alternatives did exist (A 114a, 118).

After he returned home and discussed the economics of the situation with his wife, Phillips called Gleason to reaffirm his desire to continue working. When asked if he knew what he might do, Phillips responded that he would have to sever his ties with the Union and he initiated the thought that he would do so by sending the Union a telegram the following morning (A 119). As with Gallagher, it is clear that Phillips reached this decision on his own.

The testimony of Connelly, Sr., the third of Gleason's employees present at the meeting of October 13th, confirms that Gleason did not solicit any resignations. In fact, he steadfastly refused to discuss alternatives to the lockout for fear of violating the National Labor Relations Act. Torn between his concern over infringing upon his employees' statutory rights and their pleas for guidance in connection with their individual needs, Gleason did nothing overt but confirmed their analysis of the situation by acknowledging that their decision to resign from the Union could pave the way for their return to work. By providing them the answers which the Union would not provide, Gleason's humane conduct, in the Board's eyes only, was deemed violative of

the Act.

The Board's premise that Gleason predicated the lockout as an attempt to undermine the Union or to induce his employees is demonstrably false. If no employee had brought up the subject of resignation or had not pursued Gleason repeatedly on the subject, there would have been no such discussion. The record is devoid of any suggestion, much less evidence, that Gleason brought it up or had it in mind when he decided to lock out the funeral directors.

B. The Gutterman Funeral Home, Inc. Case

Reduced to its bare essentials, the Board's case against Gutterman turns upon a finding that the Employer violated Sections 8(a)(1) and (3) of the Act solely because of one word used in the context of an isolated statement to the Shop Steward and another employee at one of Gutterman's three locations when they were advised of the lockout. This statement, uttered to only two employees, was found by the Board to be a "per se" violation of the Act and serves as the questionable basis for the overburdening and overreaching remedial order running to the benefit of all Gutterman's unit employees at the three locations.

On October 14, 1973, Michael Gutterman, Secretary of the Gutterman Funeral operation, notified Union Shop Steward Frank Marinaro, and Augie Tolomie, a co-worker and staunch Union supporter and picketer (A 22 fn. 16), that the Company was initiating a counteraction to the Union's whipsaw strike and that "no members of the Local can continue to work." (A 128) Unlike the

Gleason case, there was no finding of discussion of resignation from the Union as an alternative to re-employment. (Indeed, the likelihood of such a discussion was most remote in light of the two employee participants to this conversation, namely the Shop Steward and a co-worker who was a staunch Union adherent.) Neither Marinaro, who volunteered to advise the other employees of the lockout (A 23), nor Tolomie, who was with him, testified that they understood the reference to "members" to be a solicitation or suggestion to them or to anyone else to quit the Union and come back to work. There is no question that Mr. Tolomie testified that the only words Michael Gutterman used in describing who was being locked out were "men" and "us" (Official Report of Proceedings, page 356 line 24, page 362 line 11 and page 363 line 16) and that Mr. Marinaro testified that "we" were being locked out and that "you have been locked out" (Official Report of Proceedings, page 189 lines 2-3 and page 197 line 16) were the only words used by Mr. Gutterman. Clearly they did not see the alleged subtle message mistakenly found by the Board.

There is no testimony as to what they told the other employees at their branch or elsewhere. It is more than likely they just told them, "we are all locked out." There is nothing on the record that they understood the significance which the Board attached to the word "members" or that, arguendo, if they did, they explained it to the others.

Nevertheless, the Board's decision presumes a result and projects it across these sparse facts to support its conclusion. It is indeed difficult to believe that Gutterman would

seek to solicit resignations from two staunch Union advocates on the one hand as the Board suggests, and at the same time, would permit the Union's Shop Steward to call the other employees to advise them of the lockout. If resignations were his goal, he undoubtedly would have contacted the other employees or taken some other overt action. Clearly, the Board has built its case on a flimsy foundation, supported by one poorly chosen word. Merely because Mr. Gutterman used the term "members" in advising the employees of the lockout as opposed to the term "unit employees", the Board has allowed its fertile imagination to flow and has adopted the incongruous findings of the ALJ, which are unsupported by the record of this case.

The conclusion that the employees of the three chapels are entitled to thousands of dollars of back pay because of the use of the word "members" to two people is unwarranted, puts form over substance, and is unsupported by the evidence on the record as a whole. Absent that one word, there is no violation as the Board is not otherwise challenging the timing or use of the lockout which was given legal sanction by the Board at another charged employer (A 47) and was unchallenged by the Union at 15 other employers.

II. LOCKOUTS TO PROTECT A MULTI-EMPLOYER BARGAINING UNIT FROM WHIPSAW STRIKES ARE LAWFUL; REFUSAL TO REINSTATE LEGALLY LOCKED OUT EMPLOYEES WHILE CONDITIONS MANDATED THE LOCKOUT EXIST AND EMPLOYEES REQUESTING REINSTATEMENT ARE STILL SUPPORTING STRIKE AGAINST OTHER MEMBERS OF MULTI-EMPLOYER BARGAINING UNIT AND ARE SUBJECT TO UNION DISCIPLINE IF THEY FAIL TO SUPPORT STRIKE IS NOT UNLAWFUL AS A MATTER OF LAW OR LOGIC

APPLICABLE LAW

In Buffalo Linen (N.L.R.B. v. Truck Drivers' Local Union, 353 U.S. 87 [1957]), the Supreme Court dealt with the question of whether non-struck members of a multi-employer bargaining association commit an unfair labor practice by initiating a defensive lockout. In upholding the propriety of the lockout, the Court held that "a temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike, was lawful." (353 U.S. at 97)

In 1965, the Court in N.L.R.B. v. Brown, 380 U.S. 278 (1965), was confronted with the question of whether an employer, who locked out his employees in retaliation to a whipsaw strike, violates the Act by hiring temporary employees for the duration of the strike. There is no evidence that either Gleason or Gutterman contemplated using replacements at the time of the lockout or at any time during the lockout and in fact, Gutterman did not do so. Gleason allowed two employees to return to work but would have continued to operate without replacements had the two employees not voluntarily abandoned the Union and pursued him for permission to return to work. With facts similar to those

in the case at hand, the Court held that such conduct was not a per se violation of Sections 8(a)(1) or (3) of the Act. Having found no conduct on the employer's part which could be interpreted as evidence of anti-union motivation, the Court proceeded to equate the hiring of temporary replacements in a lockout situation to other lawful "economic measures" used by employers. Such weapons, while they may either interfere in some measure with concerted employee activities or [be] in some degree discriminatory and discourage union membership, are not violative of the Act.

The Court, in Brown, rejected the Board's conclusion that the hiring of temporary replacements in the circumstances of that case, "carries its own indicia of unlawful intent", and further noted that, "even the Board concedes that an employer may legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting schedules and transferring work from one plant to another, even if he thereby makes himself virtually strikeproof ... [and] he may in various circumstances, use the lockout as a legitimate economic weapon". The majority, therefore, concluded:

> "We do not see how the continued operations of respondents and their use of temporary replacements any more implies hostile motivation, nor how it is inherently more destructive of employee rights, than the lockout itself. Rather, the compelling inference is that this was all part and parcel of respondents' defensive measure to preserve the multi-employer group in the face of the whipsaw strike." (Id. at 284)

The Court summarized the rule in these terms:

> "When the resulting harm to employee rights is thus comparatively slight, and a substantial and legitimate business end is served, the employers' conduct is prima

facie lawful. Under these circumstances the finding of an unfair labor practice under §8(a)(3) requires a showing of improper subjective intent." (Emphasis added) (Id. at 289)

Not only may an employer lock its employees out in the face of whipsawing, it may do so purely to exert economic pressure. In American Ship Building Co. v. N.L.R.B., 380 U.S. 300 (1965), the Supreme Court held that an employer in a single bargaining unit violates neither Section 8(a)(1) nor Section 8(a)(3) of the Act "when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." The Court rejected the Board's view that only a multi-employer bargaining unit lockout in the face of a whipsaw strike or to prevent unusual economic hardship caused by a strike, is lawful.

With respect to Section 8(a)(1), the Court rejected the Board's view that an offensive lockout necessarily interferes with protected rights of employees to bargain collectively and to strike. The lockout was "intended to resist the demands made of [the employer] in the negotiations and to secure modifications of these demands." Absent any showing of anti-union animus on the part of the employer, such an intention is not "in any way inconsistent with the employees' rights to bargain collectively." Nor, declared the majority, did the lockout interfere with the right to strike, since the right to strike "is the right to cease work -- nothing more", and "there is nothing in the statute which would imply that the right to strike carries with it the right exclusively to determine the timing and duration

of all work stoppages."

Rejecting the Board's view that an offensive lockout violated Section 8(a)(3), the Court stated that a finding of such a violation requires a specific showing "that the employer acted for a proscribed purpose". The Court declared that:

> "...use of the lockout does not carry with it any necessary implication that the employer acted to discourage union membership or otherwise discriminate against union members as such. The purpose and effect of the lockout was only to bring pressure upon the union to modify its demands ... It does not appear that the natural tendency of the lockout is severely to discourage union membership ..." (Id. at 312)

Applying the principles of these cases to the cases at hand, the conduct attributed to both Gleason and Gutterman fails to support the Board's determinations and conclusions with respect to each. There is no union animus and no showing of "...improper subjective intent." (Brown, supra, at 289)

In Brown, the Court makes it clear that the improper conduct complained of must have been primarily motivated by an anti-union animus for a violation to exist. That such was not the case in either Gutterman's or Gleason's state of facts is demonstrated in part by the history of labor relations between the Employer and the Union, a continued bargaining relationship in which both Gutterman and Gleason played significant roles as part of the Association's negotiating committee and in the consistent incorporation of Union shop provisions in the collective bargaining agreements.

It should be noted that the General Counsel at the beginning of the hearing before the Administrative Law Judge,

conceded that he was not attacking the propriety of the lockout (A 27 fn. 23, A 67) and by doing so, acknowledged that the lockout was not "inherently destructive of employee interests." The General Counsel, therefore, having conceded that the lockout was not per se illegal, was required to show an improper motivation on the employer's part in order for the Board to be justified in adopting the position that a violation had been established. Brown, supra, at 289.

It is evident from reading the record herein that the Board justifies its decision solely on the basis of what was said by the Respondents. In Gutterman's case, the Board relied solely on the use of the word "members" which Mr. Gutterman equated with the bargaining unit itself; in Gleason, the Board relied solely on the responses reluctantly given by Gleason after being pressured by two of his four long-term friends and employees. In reaching its conclusions, the Board fails to establish that the requisite improper "subjective intent" or motive was anti-union animus. Indeed, there is nothing by which one can bridge the gap from the statements to "union animus" as the Board has done.

It is equally clear that, under Brown, "the Board must find evidence independent of the mere conduct involved, that the conduct was primarily motivated by an anti-union animus" in order to support a finding of a violation under the circumstances of this case. Brown, supra, at 288.

The lockout itself was permissible; the General Counsel has conceded that. Similarly, the employees had the right under §7 of the Act to refrain from Union activities, a right which

some of the employees decided to exercise for either pragmatic, philosophic or economic reasons. N.L.R.B. v. Granite State Joint Board, 409 U.S. 213 (1972); Communications Workers v. Labor Board, 215 F.2d 835 (CA 2, 1954). Their decision to withdraw support for the Union's posture was voluntary and does not support a finding that their rights had been illegally tampered with.

To the extent that the Gleason employees' decision was based upon economic pressure activated by the Employers' lockout, such pressure was a valid legal reaction to the Union's whipsaw strike which obviously these subject employees chose not to sanction. To conclude that their decision was a direct result of what the Board assumes to be anti-union animus does not correspond with the facts which fail to support even an innuendo of anti-union animus.

The Board's conclusion that Gleason's conversations with its employees with respect to resigning from the Union were per se illegal, without regard to the fact that these conversations were entered into only after repeated pleas by these employees, coupled with their own proposed alternatives, fails to come to grips with the realities of this case. When placed in their proper context and sequence (the employees' disagreement with the Union's decision to strike; their desire to continue their employment; the knowledge that they were, as Union members, subject to mandatory assessments to support the strike; they knew they had a right to resign; and their well-founded concern about further fines and assessments that the Union might levy), it is clear that Gleason did nothing more than exercise his right of

free speech protected under Section 8(c) of the National Labor Relations Act, as Amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.). That provision presumes the sanctity of any statement which "contains no threat of reprisal or force or promise of benefit".[4]

Clearly, Gleason's statements are well within the protections offered by Section 8(c). His expressions constituted nothing more than a humanitarian response to employees seeking his advice of how they could lawfully exercise their rights under the Act and continue their employment while at the same time not be subject to Union assessments, fines and discipline. There was no threat of force or reprisal, the employees instigated and forced the conversations, and just as clearly, there was no benefit promised. The employees at odds with the Union's decision to strike sought the right to work, like strikers who wish to cross a picket line and are allowed to return to work, and they desperately looked for guidance on how to implement their decision to abandon the Union without risking severe fines and assessments. The difference between them and strikers was that as long as they were members they were forced to support the strikers monetarily and that was why they were locked out in the first place. The

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[4] Section 8(c) of the Act provides:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Employer had the right to lock them out and, for the same reason, keep them out -- they were not entitled to their jobs.

Had Gleason's employees resigned from the Union without any discussions with their employer and then applied for jobs, it might very well be an unfair labor practice for Gleason to refuse to hire them based on their past [illegible] membership or condition their return on not supporting the strike against the other Association members (A 31).

The Board has endeavored to distinguish the Gleason case from Brown on the theory that resignation from the Union creates such dissension and discontent as to render the conduct "inherently destructive of employee interests" (A 29). The Board, in effect, disapproves of a result which may tend to destroy Union solidarity, while clearly, any effective lockout will create that very same atmosphere. However, a lockout is not ipso facto illegal merely because it causes discontent, nor, therefore, should Gleason's comments be deemed illegal or "inherently destructive" simply because the Board assumes that by advising an employee of his right to resign from the Union, an employer conceivably sets the stage for some intra Union discontent.

Any person who chooses to buck the organization to which he belongs, including a worker who crosses a picket line, risks incurring hard feelings and engendering dissension and a rule which is designed to insulate that organization from the realities of such circumstances is both unwarranted and unrealistic. The Board and the courts have long condoned employees abandoning a picket line and returning to work during the course of a strike,

which is at least as likely to create discontent within the organization as the situation at Gleason. The rationale used by the Board herein would likewise condemn an employer who allows a worker to cross a picket line. The Board and the courts have condoned an employer advising strikers that unless they return to work (cross a picket line) by a certain date, the employer will seek to replace them. N.L.R.B. v. Mackay Radio and Telegraph Co., 304 U.S. 333 at 345 (1938); N.L.R.B. v. United Brass Works, 287 F.2d 689 (CA 4, 1961); N.L.R.B. v. McCatron, 216 F.2d at 215 (CA 9, 1954). What could more seriously be destructive of employee rights or create more dissension than that. An employer's use of the lockout, an admittedly legal economic weapon, does not become unjustified conduct simply because it tends to weaken the impact of a strike and thereby creates hard feelings, and as Brown confirms, the hiring of replacements during a lockout situation is merely a further valid extension of an employer's economic rights and represents additional ammunition for the employer in the form of providing the unit employees the option of honoring the strike or returning to work. If by returning to work, hard feelings are created, it is just one of the many outgrowths that have become an integral part of the complexities in labor-management intra and inter relationships. The tendency to create this atmosphere, though not desirable in the Board's view, clearly is not illegal, nor "inherently destructive" of employee interests or else every employer's economic weapon, as well as the freedom of employees to act as their conscience dictates, could be struck down for the same reason.

Although the Board argues that Gleason's and Gutterman's conduct was "inherently destructive" of important employee rights, its argument is founded upon assumptions which fail to find support in the record. While the Board contends that employee resignations set the stage for internal Union dissension, and are, therefore, inherently destructive, it fails to, and is indeed unable to, support that assumption with any portion of the record in this case.

Indeed, the record not only fails to disclose that any of the subject employees resigned as a result of either Gleason's or Gutterman's comments, but it also fails to reveal any resultant dissension or disharmony being engendered as a result of the decisions by Messrs. Gallagher and Phillips to resign from the Union.

The Board relies upon N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221 (1963) (See Board's Brief, p. 23), and the other cases to support its contention that the conduct herein "might well be deemed inherently destructive" (emphasis added) (See Board's Brief, p. 23). In Erie, the Court was confronted with an employer granting benefits to non-strikers which were subsequently denied others and it was this conduct which the Board and the Court found inherently objectionable. No such parallel is found or can be implied from the facts of the instant proceedings and the Court's language in Erie is, therefore, inapplicable to this case, as it relates to Gleason and/or Gutterman.

Not only was the Gleason and Gutterman conduct not inherently destructive, but as will hereinafter be shown, it was, at the least, an appropriate business reaction to the Union's whipsaw

tactics.

As previously noted, Gutterman's case, though largely dissimilar from Gleason's, has been joined with the latter, both as findings and results with an almost "guilt by association" frenzy by the Board.

On the basis of facts previously outlined, the Board determined that the lockout by Gutterman was unlawful from its inception, as being motivated by a desire to coerce employees into resigning from Union membership, albeit that the record fails to support such a conclusion. Reduced to its bare essentials, the decision turns on the use of the one word, "members". Clearly, had Gutterman said "no unit employees can continue to work" or "no licensed funeral directors represented by Local 100 may work", no violation would have been found.

Gutterman's use of the word "members" must, therefore, be viewed in the context of the surrounding circumstances in order to determine whether it did indeed create the atmosphere which we submit the Board has erroneously fabricated.

The statement in question is the words of a layman who lacks the background and sophistication to appreciate the finer points which distinguish between "members" and "unit employees" or "employees covered by Local 100". In fact, in the declarant's eyes, as well as in those of the employees addressed, the words "members" and "unit employees" and "employees covered by Local 100" were synonymous since all unit employees were members of the Union, pursuant to Union Security clauses contained in the preceding agreements.

The use of the word "members" was not suggestive of anything other than to designate a group of employees being locked out - all licensed funeral directors, undertakers and embalmers, registered residents and trainees covered by the contract - all of whom were members of the Union, in accordance with the provisions of the collective bargaining agreement, which had expired.

Furthermore, Gutterman's statement must be evaluated in the limited context in which it was made, namely to only two employees at one of the three locations which the Corporation operates. The Shop Steward volunteered to advise the other employees of the lockout and Gutterman agreed; hardly the actions of a person seeking to induce some or all of his employees to resign from the Union.

There is no suggestion whatsoever that any employee was approached during the strike at any of Gutterman's three locations with the offer that they quit the Union and return to work or that any other conduct was engaged in which would support the contention that Gutterman's use of the word "members" in describing the lockout was more than a description of his employees as a whole.

On the other hand. Gutterman's brother continued on the negotiating committee to seek a settlement and the firm remained open for business, without replacements and unaccompanied by any other solicitation of employees or other alleged violation.

In view of the foregoing, and noting the demonstrable lack of Union animus on the part of the Employer, it is clear

beyond peradventure that the Board, very simply, read too much significance into Gutterman's choice of words. It is incredible to believe that the one above-quoted statement, standing alone in a context which belies any Union animus, can support the finding of a violation herein. It is even more incredulous that the use of the word "members", synonymous with "unit employees" to all concerned, can subject an employee to a finding of a violation of Section 8(a)(3) and to a Remedial Order, including back pay, running into many thousands of dollars. So, too, it strains all logic to hold that this one statement is sufficient to find, as Brown mandates, that the lockout itself was improperly motivated from its inception. Brown, supra, at 289.

In the context in which it was uttered - to two employees, with no follow-up, with the abandonment of the employer's opportunity to give the alleged "subtle message" to the other employees and the continued participation in active negotiations with the Union, it is submitted that the Board has misinterpreted and misconstrued the plain meaning of Gutterman's words, to wit: bargaining unit employees, all of whom were members of the Union, were being locked out. The Board's inferences and suspicions, with nothing more, are clearly inadequate to demonstrate the motive which the Board would attach. N.L.R.B. v. Chronicle Publishing Co., 230 F.2d 543 (CA 7, 1956).

Assuming arguendo that Gutterman's inappropriate word selection can cost the Company many thousands of dollars in back pay for all the bargaining unit employees with no inquiry into causal relationship, it is respectfully submitted that Gutterman

had the right to lock out members of the Union, without locking out "unit employees" even if it did have "unit employees" who are not members of the Union. Concededly, such a circumstance would constitute discrimination against those members of the Union, solely because of their membership, but this discrimination is clearly outweighed by the substantial business interest of the employer. Indeed, it is the very essence of the Supreme Court's decision in Brown wherein the Court held that an employer may lawfully discriminate against employees solely for their membership in a union which is engaged in a whipsaw strike if a legitimate business purpose can be demonstrated. In this regard, and as noted previously, there is no question as to the legitimate business purpose of all Respondents. Thus, absent a finding that Gutterman's statement is so inherently destructive of employees' rights as to be conclusively violative of the Act, the inquiry must focus on the employers' business justification, and it is respectfully submitted that the existence of this substantial justification is demonstrated beyond peradventure.

The sequence of events, the facts, indeed the testimony itself, clearly reveal that Gutterman was not being devious in his use of the phrase "members of the Local" when defining the employees who were being locked out, for it clearly defined all the employees covered by the contract. There were no other implications, suggestions or inferences and, paraphrasing the Supreme Court in Brown, "Under these circumstances there was no showing of improper subjective intent to find an unfair labor practice under Section 8(a)(3)". (Emphasis added) Brown, supra.

Reference has been previously made to the Board's severe remedy vis-a-vis Gutterman, namely the imposition of back pay, apparently to all unit employees at all three locations, albeit that the alleged unfair practices at most were limited to two employees at the Manhattan location where the record fails to even suggest that the conduct complained of was extended beyond this limited audience. Even assuming at the worst that Gutterman's conduct did violate Sections 8(a)(1) and (3) of the Act, there is clearly no basis for extending the remedy into the untainted and unaffected locations of Brooklyn and Rockville Center.

The Board's decision to impose this severe and unconscionscionable remedy in such a hard and harsh fashion only serves to further underscore the mechanical approach taken in this case without any regard or consideration whatsoever to the operative and relevant facts. We submit that, at its worst, the Respondent's conduct and its impact can only be translated to the two Manhattan employees who participated in the conversation with Gutterman. The Board chose not to adduce any testimony as to what, if anything, the Shop Steward said to the other employees at the other branches or how he understood the layoff to be couched. The Board's decision to the contrary defies logic and is in complete discord with the facts.

If the true purpose of the back pay remedy is to make whole those who have unjustly suffered due to the employer's improper conduct, one must look to what purpose is served by awarding back pay to the employees who were legally locked out, and

who were not "subtly" or otherwise solicited to resign as "members". It is difficult to understand how they develop a right to back pay as a result of a statement made to two employees in a different location (which statement the two union supporters never understood as a solicitation in the first place), a statement which they probably were never told of until the Board proceeding developed, well after the strike was settled, and which, therefore, played no role in their remaining out of work. Indeed, they had no other choice in view of Gutterman's legal lockout. How, under these circumstances, can the Board justify the windfall which these employees will receive and the corresponding burden imposed upon Gutterman when the record itself is silent with respect to any of the employees having learned of Gutterman's statement or being affected by it at any time during the strike?

The Board's overly broad remedy finds no basis in the record and should, therefore, at the very least, be appropriately modified.

## III. ASSUMING ARGUENDO THAT THE STATEMENTS OF GLEASON AND GUTTERMAN ARE INTERPRETED AS REQUIRING RESIGNATION FROM THE UNION AS A CONDITION PRECEDENT TO RETURNING TO WORK, THEY ARE NEVERTHELESS LAWFUL, IN VIEW OF THE LEGITIMATE BUSINESS OBJECTIVES OF THE RESPONDENTS

Assuming arguendo that all of the findings of fact and inferences drawn therefrom by the Administrative Law Judge and adopted by the Board are affirmed, Respondents have a demonstrably legitimate interest in conditioning re-employment of

locked out employees on resignation from the Union pursuant to the Supreme Court's decision in Brown.

The motivation of the lockout was to protect the integrity of the multi-employer bargaining unit in the face of the whipsaw tactic. At the moment of the lockout, the economic advantage was with the struck employers who were continuing operations with supervisory employees, temporary replacements and independent contractors:

> "The Court of Appeals correctly pictured the respondents' dilemma in saying, 'If ... the struck employer does choose to operate with replacements and the other employers cannot replace after lockout, the economic advantage passes to the struck member, the non-struck members are deterred in exercising the defensive lockout, and the whipsaw strike ... enjoys an almost inescapable prospect of success.'" (citations omitted) Brown, supra (380 U.S. at 284-285.
>
> "Clearly respondents' continued operations with the use of temporary replacements following the lockout was wholly consistent with a legitimate business purpose." (Id. at 285)

In argument before the Supreme Court, the Board, in Brown, conceding the necessity of continued operations by the employers' exercise of the right to lock out, urged that once having locked out, the employers violated the Act by refusing to utilize their own employees solely because of their union membership and by resorting to non-union employees. The Court responded:

> "Nor are we persuaded by the Board's argument that justification for the inference of hostile motivation appears in the respondents' use of temporary employees rather than some of the regular employees. It is not commonsense, we think, to say that the regular employees were 'willing to work at the employers' terms'." (citations omitted) (Id. at 285)

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> "Moreover, the course of action to which the Board would limit the respondents would focus them into the position of aiding and abetting the success of the whipsaw strike and consequently would render 'largely illusory', (citations omitted), the right of lockout recognized by Buffalo Linen; the right would be meaningless if barred to nonstruck stores that find it necessary to operate because the struck store does so." (Id. at 285)

It is clear that the instant matter is in all respects identical to the factual situation presented in Brown up to the point where resignations from the union were discussed as a quid pro quo for returning to work during the lockout. Thus, the important question of law presented herein, one of first impression, is whether an employer who, concededly, has the right to lock out as a defense to a whipsaw strike and has the further right to continue operations with temporary employees to the exclusion of its regular employees solely on the basis of the latters' union membership, may, in furtherance of legitimate business interests, categorically refuse to employ any member of the striking union, whether that member be a regular employee of the employer or not. If the answer to this question is affirmative, the instant proceedings must be dismissed, as a matter of law, for if Respondents Gleason and Gutterman had the right to systematically exclude any Union member from employment for the duration of the strike and lockout, it necessarily follows that such right would include the right to communicate the exercise of it to prospective employees, whether they be Union members or not. Notice should be taken of the limited source for replacements in the funeral industry in New York. Replacements must be licensed by the State, come from a restricted supply as

a result, and are primarily members of the Union.

Re-stated in somewhat different terms, if the Respondents had the right to refuse to hire any applicant as a temporary replacement solely because of his membership in the striking Union, they would, therefore, possess the right to advise any such applicant of the reason for denying them employment. It, therefore, follows that they would also have the right to advise the prospective employees of the means to cure the disability which prevented their employment.

If Gutterman's locked-out employees had applied for temporary jobs at Gleason, and vice versa, clearly the respective employers could have refused to hire them because they were members of the striking Union. A contrary holding would mean that a Union engaged in a whipsaw strike against some members of a multi-employer bargaining unit may further the whipsaw tactic by advising locked out employees to play "musical employers" for the duration of the dispute. Clearly, such a holding would utterly emasculate the rationale of Brown and would render "'largely illusory' the right of lockout recognized in Buffalo Linen." It is merely a logical and required extension of the rationale of Brown to hold that an employer who locks out in response to a whipsaw strike may categorically refuse employment to any member of the striking union in furtherance of the employer's legitimate, defensive interests.

Such action is a basic element of the financial pressure an employer may seek to impose on a striking union and is not to be equated with anti-union animus. Thus, in N.L.R.B. v.

Great Falls Employees' Council, 277 F.2d 772 (CA 9, 1960), the 9th Circuit held that employers who locked out unit employees in defense to a whipsaw strike could exert pressure on the employees by resisting their claim for unemployment benefits and such action was not claimed by the Court to carry an indicia of unlawful intent.

Quite prominently interwoven into the fabric of this case is the fact that as long as the Respondents' employees were members of the Union, not only did they stand to gain directly by the success of the whipsaw strike, but they were obligated to contribute to mandatory strike assessments against their wages, which monies were used to support the Union's whipsaw strike activities. While Respondents, arguably, could not prevent voluntary contributions to the Union strike fund by resigned members, they could, consistent with their legitimate business interests, be they viewed as offensive or defensive, refuse to employ any person who would so directly benefit from continuation of the strike, or who was subject to mandatory contributions to the strike fund. Thus, a holding that Respondents could not lawfully refuse to employ any member of the striking Union solely on the continuation of said membership would, in effect, require Respondents to aid and abet the whipsaw strike by financing it.

The Administrative Law Judge and the Board correctly noted the important and novel question of law presented herein as well as the intrinsic logic of the foregoing rationale which leads to the inescapable conclusion that Respondents' conduct is consistent with the principles enunciated in Brown:

> "The narrow legal issue, as I view it, is whether conditioning the employees' return on their resignation from the Union is a valid alternative to the Brown power of replacement. As a matter of pure logic, it might appear so. If an employer may properly refuse to retain his employees and use 'temporary nonunion [strangers] in preference to the locked out union members' (Brown, 380 U.S. at 288), he might logically -- perhaps a fortiori -- be able to recall the locked-out employees when they satisfy the same nonunion condition. Or, stated differently, since the employees' union status would warrant their continued exclusion from their jobs for the duration of the strike, logic would seem to permit the employer to condition their return, while the strike lasts, on their shedding that status." (Emphasis added) (A 28-29)

The Board would have done well to end discussion of the issue there having found Respondents' conduct consistent with Brown. However, and quite unexplainably, it then proceeds to an analysis of the tendency of Respondents' actions to discourage Union membership and a weighing of the legitimate business interests served by those actions. Such an analysis is completely unnecessary in view of the previous finding of support for Respondents' actions in Brown. Moreover, the Supreme Court, having found that the lockout and utilization of temporary replacements and, by natural extension, Respondents' actions herein, were not inherently destructive of employees' rights and justified by legitimate business interests, it is not the province of the Administrative Law Judge or the Board to reassess those determinations. While recognizing that Brown does not lay down per se rules, its precedential value is, of necessity, applicable to the instant case based on the demonstrable similarities in the facts.

The Board discusses the tendency of Respondents' action

to discourage Union membership and finds that it is more so in the instant matter than in Brown. Respondents respectfully submit that this tendency is no greater than in Brown or, alternatively, if it be some degree greater, it is more than justified by the legitimate business interest to be served.

The basis for the Board's finding that the instant case creates a greater tendency to discourage Union membership is speculative at best:

> "the employees who resigned are likely to return to the Union at the conclusion of the strike with a diminished loyalty to the Union and with the stage set for internal dissension." (A 29-30)

Such hypothecation is intrinsically unsound and highly improper. Not only is that subject one for employee determination of the exercise of his individual rights under the Act, as is the case with an employee who crosses a picket line, but as the Supreme Court has observed, the right to strike does not carry with it the right to be free from economic pressure exerted by the employer, so too, the right to strike does not carry with it the right of union to be free from internal dissension. American Ship Building, supra. Indeed, the Court in Brown recognized the internal dissension which is caused by the use of temporary replacements and which is manifested in internal pressure by locked out members on the Union to end the strike. The Court held that the Act did not protect the Union from this internal dissension and there is no basis in fact for finding the internal dissension created by the employers in Brown is any greater or lesser than in the instant matter.

It must also be noted that the right of the Union to be free from internal dissension is not protected by the Act, but rather, the Act is designed to protect the rights of employees. To hold that such a provision may be read into the Act would compel the conclusion that employers too are protected from divisive actions and, ipso facto, whipsaw strikes would be per se violations. To carry the Board's speculation to its logical conclusion, every time an employer takes any action, be it a contract proposal, implementation of a benefit for non-union employees, or discipline of a union member, the employer has violated the Act if his action creates division and dissension within the Union.

Perhaps even more importantly, it is clear that substantively, Respondents' actions herein were not the case of any internal dissension. Rather, they were the product of the dissension and disagreement with the Union's decision to strike. The Board's conclusions on this point completely ignore the facts of industrial life to the extent that they forecast dissension and discouragement of Union membership after resolution of the instant dispute. Just as there are hard feelings and ill will between employers and unions during periods of strikes and lockouts, which is all rather quickly dissipated upon the resolution of their differences, so too, ill feeling between unions and recalcitrant members quickly evaporates when the storm of the existing dispute is calmed by the fair winds of resolution.

Indeed, if anything, resignations during a strike by

employees who desire to continue working in conflict with union directives harbors less potential for long range dissension than employees who work during a strike without resigning. The fines and other discipline which unions may lawfully impose upon members who work during a strike leaves much deeper and more lasting scars than the temporary defectors who return to the fold after the strike. Appropriate hereto is the specific finding that the subject employees were concerned about possible recriminations by the Union, noting the reference to fines imposed in a prior strike. In case any of the employees had forgotten the Union fines levied in the past, a Union officer instructed Gleason's employees that the Union was not accepting resignations and that anyone who even attempted to resign would be fined. (A 141)

Lastly, noting that any employee who did in fact resign would eventually have to rejoin the Union, pursuant to the Union Security clause (which was not in issue at the negotiations, but rather, had been in many preceding contracts, and admittedly would be continued in the next contract as per agreement reached in negotiations prior to the strike and lockout), the Board finds that these individuals would have to bear the ire of the Union. This finding assumes that when the resigned employees rejoin the Union, the Union would illegally visit ire upon them. It is a well settled principle of law that once having resigned, employees are free from any Union discipline and it is just as well settled that after the strike, the Union must readmit them to membership without imposition of any discipline or recriminations.

Thus, as the Union may not lawfully vent its anger on the resigned employees upon the conclusion of the strike, it follows that the Board's determination of a greater and more lasting tendency to discourage Union membership in the instant matter as compared to Brown is wholly unsupported. To the contrary, it is readily apparent that the dissension within the Union and the tendency to discourage Union membership caused by the resignations herein is no greater than that generated by the lockout itself, by the use of temporary replacements, and by the resulting internal pressure on the Union to abandon the strike.

Furthermore, to the extent that an unlawful motive to cause dissension within a union is required to find a violation, the facts in the instant matter belie its existence. If Gleason wanted to generate long-term dissension, he would not have taken such great pains to indicate that the resignations decided upon by the employees themselves could be only temporary and co-existent with the length of the strike.

Apparently, realizing the intrinsic fallacies of its determination, the Board concedes that the Respondents' conduct is not so inherently destructive of employee interests as to not warrant consideration of the business reasons for the conduct, citing therein Brown. Assuming arguendo that the tendency to discourage Union membership is somewhat greater than it was in Brown, it is respectfully submitted that the Board's determination that Respondents' business justification is insufficient to outweigh the coercive effects of the conduct is erroneous. As demonstrated, there was a very strong, well defined business

justification, i.e., the desire not to finance a strike against itself, thereby prolonging and insuring the effectiveness of the Union's whipsaw tactics. And, as expressed earlier herein, that business justification is no different than that found by the Supreme Court in Brown as sufficient to outweigh discriminatory effects. Indeed, to the extent that the tendency to discourage Union membership may be greater here than in Brown, so too, the business justification is greater here.

In sum, Gleason's conduct of locking out its licensed funeral directors and conditioning their rehire upon resignation from the Union was, as the record clearly demonstrates, neither "inherently destructive" of the vital employee rights nor without any valid and substantial business justification. The alleged "conditioning" in Gutterman is based solely on the word "members" and thus is so tenuous as to make it difficult, if not impossible, to consider the two cases jointly. However, in any event, the conduct of each was justified and not violative of the Act.

## IV. THE BOARD'S FINDING THAT MARTIN A. GLEASON, INC. VIOLATED SECTION 8(a)(1) OF THE ACT BY REQUESTING ITS EMPLOYEES TO PROVIDE IT WITH COPIES OF STATEMENTS SUBMITTED TO THE BOARD IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE AND IS NOT AS A MATTER OF LAW VIOLATIVE OF THE ACT

On or about January 31, 1974, the Regional Director of Region 29 issued a complaint against Gleason and Gutterman

alleging violations of Sections 8(a)(1) and (3) of the National Labor Relations Act in connection with the lockout of unit employees. Shortly after receiving the complaint, President John Gleason asked the four employees who were involved in the proceeding whether they would have any objections to providing him with a copy of the statements which they had furnished to the Board (A 74).

Gleason indicated quite clearly that their consent was purely voluntary and that they were under no compulsion to comply. Each of them willingly consented to do so and wrote to the Board's Regional Office requesting copies of their statements with one employee, Connelly, Sr., asking the Board for advice on the impact of this action vis-a-vis his "position in this matter" (A 72).

Not only were these employees willing to furnish their statements as requested, but the Board apparently also saw no difficulty in their doing so in spite of the explicit request for advice by one of the four unit people.

After voluntarily releasing the subject statements, the Board then amended its complaint before the Administrative Law Judge incorporating this transaction as an independent violation of Section 8(a)(1) of the Act.

In its decision on this aspect of the case, the divided Board concluded that Gleason's conduct "would naturally inhibit its employees' desire to cooperate with the Board's investigative efforts and deter others from so cooperating."[5]

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[5] Chairman Miller dissented from this decision, finding the

In his dissent, Chairman Miller determined that Gleason's requests were a lawful part of its pre-trial preparation and that the circumstances involved indicate that there was no coercion or threats and that compliance was completely voluntary. In addition to which, Chairman Miller, recognizing the injustice of the Regional Office's unquestioning compliance with the requests, took issue with their failure to discourage the furnishing of the statement on the one hand and their assertion that the mere request for copies of these statements violates the Act on the other.

As hereinafter shown, the substantial evidence on the record considered as a whole fails to support the Board's majority conclusion. By the clear language of its decision, the Board creates the unmistakable impression that it is inferring an effect which it attributes to conduct of the Respondent Gleason. There can be no other reading of that portion of the decision which states:

> "... that the Respondent's conduct in the circumstances of this case would naturally inhibit its employees' desire to cooperate with the Board's investigative efforts and deter others from so cooperating." (A 46)

The Board has assumed, therefore, that the mere request, as conveyed to the employees, might conceivably serve to

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[5](cont'd.) requests lawful inasmuch as they were made after the complaint had issued as part of Gleason's pretrial preparation. In addition to which, the requests were not accompanied by any coercive or threatening statements and compliance was completely voluntary. Furthermore, the Regional Office, which was aware of the purpose of the requests, did nothing to discourage the employees from obtaining copies of their statement and furnishing same to Gleason. (A 45-46, n.2)

inhibit the employees and is, therefore, violative and yet the record reflects an entirely different set of circumstances.

Messrs. Connelly, Sr., Connelly, Jr., Phillips and Gallagher each testified that, in early February, John Gleason asked them if they would request, or had any objections to requesting, a copy of the statements which they had given to the Board (A 74, 77, 87, 116, 120). That there was no implied threat or coercion involved and that no reprisals would result from a refusal is evidenced by the testimony of Mr. Gallagher, who indicated that Gleason made it clear that "it was a voluntary act and if I didn't want to do it, he wouldn't hold anything against me." (A 116)

Given these conditions, the Board's logic becomes difficult to support for indeed the record is barren of any testimony which would support a finding that the employees were in any way inhibited as a result of this innocent and fully justified request by Gleason.

The substantial evidence on the record considered as a whole does not justify the Board's broad based conclusion that "... an employer's request for statements given to the Board may be interpreted by the affected employees as an order with the consequent invasion of their Section 7 rights." (A 46) This language suggests that the Board has applied a per se rule with respect to this kind of activity and conduct.

In its brief, the Board seeks to justify and support its result by asserting the privileged and confidential nature of statements given (Brief, p. 31).

While the statements may indeed take on an aspect of confidentiality, it is clearly a privilege which is intended to protect the employee and it is equally clear that the employee can, if he so chooses, pierce the confidentiality and ask that the statements be disclosed. To assume that whenever an employee voluntarily asks the Board to provide his employer with a copy of the statement, that the employer is per se guilty of Section 8(a)(1) conduct for having requested the employee to do so, places an unconscionable burden upon the employer which, as is true in this case, may not be justified by the facts.

Nevertheless, we submit that within the context of the standards which may be gleaned from prior decisions, Gleason's conduct falls well within those tests as they have been articulated by this Circuit in its decisions on this point.

In Henry I. Siegel Co. v. N.L.R.B., 328 F.2d 25 (CA 2, 1964), this Court enforced the Board's finding that an employer who conducted widespread interrogation of employees in preparation of its defense to an unfair labor practice hearing, violated Section 8(a)(1) of the Act. The employees there had testified to their apprehension when requested to deliver copies of their affidavits to the extent that some were induced to destroy their copies. Under these circumstances, the Court found:

> "There is substantial evidence on the record considered as a whole to sustain the Board's conclusion that the Employer's request did have an inhibitory effect on the employees' exercise of their right to have an effective investigation by the Board of alleged Unfair Labor Practices." (Siegel, supra)

Thereafter, in N.L.R.B. v. General Stencils, Inc.,

438 F.2d 894 (CA 2, 1971), this Court was petitioned by the Board to enforce its findings of a violation where an employer requested copies of employees' statements under circumstances in which the record was devoid of any evidence of employee apprehension or inhibitions. In affirming the Board's order, the Court stated, however:

> "Unlike the situation in Henry I. Siegel Co., however, where we noted that the employer's requests for copies of statements given by employees to a Board investigator 'did have an inhibitory effect on the employees' exercise of their right to have an effective investigation by the Board of alleged unfair labor practices', ... - to the extent that several employees were induced to destroy the copies of their statements, Kretschmer's testimony does not suggest that he felt himself subject to coercion - indeed, he apparently had no qualms in indicating to Klugman that he told the Board 'the truth'. We thus might have hesitated in sustaining the Board's finding on this issue were it not that we perceive no legitimate employer interest in the solicitation of such information under the circumstances here presented and an order condemning such questioning without proof of effect is thus justified." (Citations and footnotes omitted) (General Stencils, supra, at 898.)

Clearly, therefore, a reading of these two cases produces a viable test to be utilized in determining whether a violation has occurred rather than resorting to the mechanical application of a per se rule as the Board has in this case:

(a) Is there a justifiable need by the employer for the information sought?

(b) If an employer need is established, does its exercise have an inhibitory effect on its employees to the extent that "it tends to coerce employees"?

The Board's case is premised on the position that an employer's request for pre-trial affidavits from his employees

of necessity has an inhibitory impact. However, the record herein, taken as a whole, is barren of any evidence which would support such a contention. Not only was the voluntariness of the employees' cooperation stressed by Gleason, but they were also informed that there would be no hard feelings if they chose not to submit statements. (A 116, 120, 121)

The Board cavalierly assumes that the Respondent did not need the statements in question by implying that the request for these statements exceeded the necessities of trial preparation. Yet these statements were clearly germain to the preparation of the Respondent's defense to the proceedings in question as well as in connection with unfair practices filed against the Union relating to the same conversation in which the Respondent was alleged to have violated the Act. By requesting the affidavits, Gleason chose a far more neutral method of obtaining information to prepare for the trial. The alternative, interrogating the employees at length in connection with their testimony, would have run the risk of alienating and antagonizing these individuals as well as possibly infringing upon their Section 7 rights.

Evidently, what the Board has done is to create on its own an issue which never existed in fact or in the minds of the subject employees. Indeed, the realities of this case reveal that the Regional Office, knowing full well that the employees intended to deliver copies of their statements to their employer and despite an express request for guidance and advice from one of the employees as to the propriety of giving up

copies of these statements, nevertheless chose to furnish them to the employees in toto with no questions asked.

The Board, now behind a facade of righteousness, claims that its own Rules and Regulations provide the only appropriate vehicle for the release of such statements (see Board's Brief, p. 31). Despite its complicity in overlooking these purported guidelines and despite its own violation of these very same Rules, the Board, having placed itself in pari delicto by complying with the employees' requests, asserts that Gleason is to blame. We submit that this approach is not only factually unsound but is inequitable in all respects.

The General Counsel's conduct must, under the circumstances of this case, and as a matter of law, operate as an estoppel to its prosecution of this allegation. N.L.R.B. v. W.T. Grant Co., 337 F.2d 447 (CA 7, 1964).

By urging this Court to adopt its view that the mere request to an employee to provide copies of his affidavit to the Board represents a Section 8(a)(1) violation, the Board seeks an adoption of a per se rule which this Circuit, and others, have heretofore disavowed.

Thus, in Robertshaw Controls Co. v. N.L.R.B., 483 F.2d 762 (CA 4, 1973), the Court denied enforcement of the Board's order finding a violation where the Board had ruled that the mere request for a pre-hearing statement constituted a violation of the Act. In rejecting this view, the Court noted that it could not accept this ruling as supported by the record and that, under the particular facts and circumstances of the case, the

"employer's request for copies of statements would not deter other employees from giving statements to the Board's agents nor would it interfere with the free exercise of employee rights."

Similarly, in Texas Industries, Inc. v. N.L.R.B., 336 F.2d 128 (CA 5, 1964) and Surprenant Mfg. Co. v. N.L.R.B., 341 F.2d 756 (CA 6, 1965), the 5th and 6th Circuits respectively enforced the Board's findings of violations based upon specific factual determinations rather than the blanket application of a per se rule which the Board has applied in this case.

While it is true that this aspect of the case arises from a matter involving other allegations of unfair labor conduct, that conduct is far removed in time and impact from Gleason's actions which form the basis of the independent Section 8(a)(1) violation against Gleason, it must claim an interrelationship in sequence by alleging that the request for the statements was made in the context of other severe unfair conduct, which simply is not the case. Having made that initial inaccurate assumption, the Board moves on to assume that the mere request for the affidavits tended to coerce employees, a rather puzzling assumption in view of the record's complete silence or support of that view.

Curiously enough, the Board chooses not to explain or justify the Regional Office's conduct in readily providing the statements, and we must assume that their silence on this significant and crucial aspect of the case represents their acknowledgement of the troublesome role played as participant on the one hand and prosecutor on the other. While the Board's

brief stresses the need for confidentiality, it disregards the role it played in failing to secure this confidentiality. We submit that this issue, which the General Counsel had injected at the trial, is a false issue and that the Board's findings are wholly unwarranted in view of the record herein and in light of the case-by-case interpretation adopted by the various circuits, in particular, the Second Circuit. N.L.R.B. v. General Stencils, Inc., supra; Henry I. Siegel Co. v. N.L.R.B., supra.

In fact, Gleason learned from the affidavits that the Board had in its possession sworn statements from employees supporting Gleason's defense to the lockout charges discussed above, which evidence was not presented by the Board to balance the accusatory testimony it presented before the Administrative Law Judge and which might not have been presented but for acquisition by the Employer of the affidavits in question. The Board would, therefore, tie the hands of a respondent and prevent it from obtaining relevant facts which support the respondent as the Board would clearly not use such an affiant at trial and, therefore, would be under no compulsion to make his affidavit available. Such are the circumstances that lead respondents to ask employees to voluntarily, without fear of reprisal, obtain copies of affidavits. If the Board presented all relevant testimony, pro and con, and let the Administrative Law Judge make his determination from such a record, respondents would not have to search for employee witnesses who had controverted what other employees had said in the investigatory stage of the case. Such openness can only lead to more valid credibility resolutions.

As long as the Board holds back, respondents must seek ways to avoid the classic employer versus employee and union credibility conflicts by seeking employees who told it as it was but whom the Board neither uses at trial nor identifies. As stated earlier, the Board is too concerned with its role as a prosecutor to accept the responsibility with which it has been cloaked.

V. SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE FAILS TO SUPPORT THE BOARD'S CONCLUSION THAT GLEASON'S AND GARLICK'S OBJECTIONS TO A PROPOSED SETTLEMENT AGREEMENT ENTERED INTO BY THE UNION AND THE BOARD'S GENERAL COUNSEL WERE INSUFFICIENT TO JUSTIFY REJECTION OF SAID AGREEMENT; THE BOARD IMPROPERLY EXERCISED ITS DISCRETION IN FASHIONING A REMEDY WHICH DENIED BACK PAY TO EMPLOYEES DISCRIMINATED AGAINST BY THE UNION IN VIOLATION OF SECTION 8(b)(1)(A) OF THE ACT

No. 75-4047

BACKGROUND

On March 13, 1974, Gleason and J.N. Garlick Funeral Homes, Inc. filed unfair labor practice charges alleging that the Union had violated Section 8(b)(1)(A) of the Act by improperly restraining employees in the exercise of their Section 7 rights, and by illegally coercing said employees to maintain their membership in and to continue their support and assistance of the Respondent Union.

The Regional Director's initial refusal to issue a complaint on these charges was set aside by the General Counsel's

instructions as a result of an appeal filed by the charging parties. Thereafter, on July 25, 1974, the Regional Director issued a consolidated complaint alleging that the Union, in violation of Section 8(b)(1)(A) of the Act, advised employees of the charging parties that the Respondent Union would refuse their resignations and would impose fines and other penalties if they sought to resign or cross the Union's picket line.

Shortly before the trial of the issues scheduled for August 27, 1974, the Union and counsel for the Board's General Counsel entered into a formal stipulation settling the charges filed against the Union. The charging parties objected to the proposed settlement on the grounds that it did not fully remedy the unfair labor practices alleged in the complaint because:

(a) It contains a "Non-Admissions Clause"; and

(b) It makes no provision for payment of back pay by the Union to these individuals who were coerced by the subject unfair labor practices.

## ARGUMENT

In a series of recent cases, the United States Supreme Court upheld the right of union members to resign from the Union in order to avoid the imposition of fines for post-resignation work during a strike and found that the Union's imposition of such fines violated Section 8(b)(1) of the Act. N.L.R.B. v. Granite State Joint Board, 409 U.S. 213 (1972); Booster Lodge No. 405 v. N.L.R.B., 412 U.S. 84 (1973).

In Granite State, the Supreme Court reversed a decision by the Court of Appeals for the First Circuit denying enforcement to a Board order which found a violation of Section 8(b)(1) in the Union's attempted enforcement of fines against employees for post-resignation work during a strike. A few days before expiration of the collective bargaining agreement, the union membership voted to strike. After the strike began, the membership resolved that any member aiding or abetting the employer during the strike would be subject to a $2,000.00 fine. Thereafter, 31 employees resigned their membership and returned to work and were subsequently fined.

In finding this effort to impose these fines violative of the Act, the Court held that "the power of the union over the member is certainly no greater than the union-member contract .... [W]hen there is a lawful dissolution of the union-member relation, the union has no more control over the former member than it has over the man in the street." (Granite State, supra.)

In Booster Lodge No. 405 v. N.L.R.B., 412 U.S. 84 (1973), the Union struck Boeing Aircraft Corporation at the expiration of the collective bargaining agreement. Sixty-one employees resigned their membership prior to returning to work and another fifty-eight resigned after they had returned to work. The union fined these individuals and sought to collect some of the fines in State Court. The company filed unfair labor practice charges which alleged Section 8(b)(1)(A) violations as a result of the fines imposed upon those who had resigned their membership before returning to work and by the fines imposed upon those who had

resigned to the extent that such fines were based upon post-resignation work. The Board ordered the Union to cease and desist from fining employees who had resigned as indicated above and the Supreme Court sustained the Board's order.

The Court has on other occasions expressly recognized the right of resignation as being within the explicit protection of Section 7 of the Act:

> "Under §7 of the Act the employees have 'the right to refrain from any and all' concerted activities relating to collective bargaining or mutual aid and protection, as well as the right to join a union and participate in those concerted activities. We have here no problem of construing a union's constitution or bylaws defining or limiting the circumstances under which a member may resign from the union. We have, therefore, only to apply the law which normally is reflected in our free institutions - the right of the individual to join or to resign from associations, as he sees fit 'subject of course to any financial obligations due and owing' the group with which he was associated. Communications Workers v. Labor Board, 215 F.2d 835, 838 (footnote omitted); (NLRB v. Granite State Joint Board, 309 U.S. 213 (1972)).

Similarly, Section 7 protects the right of employees to engage in certain activities, including picketing, and also protects their right to refrain from engaging in such activities subject only to internal restrictions imposed by a union. Here, the only internal restriction on this right to refrain from engaging in said activities is Respondent's right to fine and otherwise discipline those who are members. As a matter of law, Respondent has no right to fine or otherwise discipline those who are no longer members, and any attempt to do so is violative of the Act.

Based on the foregoing, it is respectfully submitted

that any activity engaged in by a union which has the effect of restraining or coercing employees in the exercise of their Section 7 rights to resign their union membership and/or to refrain from engaging in picket line or other strike activities, is violative of Section 8(b)(1)(A).

Even at first blush it is apparent that the full impact of this conduct was not remedied by the proposed Settlement Agreement. In the first place, the inclusion of a "non-admissions" clause serves to emasculate any viable basis which the aggrieved employees might have had to satisfy themselves that their rights under the Act had been vindicated. The further futility of their situation is amplified by the fact that while they may have been inclined to resign from the Union and return to their jobs in mid-October, their decision to do so was drastically reversed as a result of the Union's threats and other devastating conduct. The failure to provide a back pay remedy does nothing to fill the rather significant gap in earnings which these individuals incurred and would have avoided but for the Union's improper conduct.

It seems wholly inconsistent with Board practice and policy to merely slap the Union on the wrist and warn them not to engage in this conduct again while doing nothing to vindicate the encroachment on the aggrieved employees' rights and make them whole for their losses. By simple reference to the remedy imposed upon Gleason and Gutterman in the companion case, it is obvious that where an employer is charged with violations which arguably tend to deprive an employee of his right to earn wages,

a back pay remedy is imposed on the theory that it serves to effectuate the purposes of the Act as well as to make the aggrieved whole. The Board's adoption of a different standard where the Union has violated the Act to the financial detriment of an employee does nothing to legitimize the argument that to reach a different result would not serve to effectuate the Act.

The Board's basic argument vis-a-vis the exculpatory language and the lack of a back pay remedy is that there has been no showing that the inclusion of the former and the exclusion of the latter fails to effectively remedy the unfair labor practices engaged in by the Union. We trust that the aggrieved individuals, whose statutory rights have been infringed upon, adopt a different view. If, indeed, they have been financially damaged by virtue of the Union's illegal conduct, the refusal to make them whole clearly does not achieve the desired result.

In light of the gravity and impact of the Union's conduct, the inclusion of the Non-Admission clause by its very nature impairs the effective implementation of the Act. Indeed, its inclusion is frowned upon as reflected by Section 10130.6 of the National Labor Relations Board Internal Instructions and Guidelines in Unfair Labor Practice Proceedings. That Section provides, inter alia:

> "'Nonadmission' clauses: 'Nonadmission' of liability by the respondent should not be routinely incorporated in either formal or informal settlement agreements and/or the notices. The incorporation of 'nonadmission' clauses, whether it be in the settlement agreements themselves or in the notices, reduces the effectiveness of the settlements by permitting the respondents to disavow responsibility for the conduct which in fact gave rise to the proceeding. While it is

> recognized tha[illegible]n certain situations the purposes of the Act may be amply effectuated by the incorporation of 'nonadmission' clauses, such situation should be regarded as exceptional, particularly where a practitioner as a matter of course routinely insists upon nonadmission regardless of the facts or nature of the case." (emphasis added)

Utilizing the Board's own guidelines, it is apparent that nothing in this record reflects that this case is of such an "exceptional" nature as to warrant the inclusion of the subject clause. It is further evident that the Union's actions and the resultant impact on the unit employees clearly reveals that the clause itself would frustrate rather than effectuate the policies of the Act.

There is no dispute but that the key in determining the inclusion or exclusion of material from a settlement is whether or not the settlement and remedy will effectuate the policies of the Act. One would necessarily assume that if effective remedies, including back pay, are required of employers to effectuate the purposes of the Act, no less of a standard would be required to resolve a Union's violations. As the Board itself has on other occasions acknowledged:

> "... the purpose of a remedy must be reiteration of the status quo to the greatest extent practicable. However, the basic purpose of restoring the status quo is to redress the injury done to employees. See, e.g., Local 60 Bhd of Carpenters v. NLRB, 365 U.S. 651 (1961), Frank Bros. Co. v. NLRB, 321 U.S. 702 (1944), Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940) ... The crucial element in all these cases is the freedom of choice of the workers in a bargaining unit ... The purpose of Board remedies is to rectify the harm done to the injured workers ..." Local 57 ILGWU, AFL-CIO v. N.L.R.B., 374 F.2d 295 (CA DC, 1967), cert. denied 387 U.S. 942 (1967).

It is apparent that in structuring the settlement

agreement herein, the Board lost sight of its purpose vis-a-vis the subject employees in view of its failure to rectify the real harm suffered by them. Clearly the Union, anticipating the resignation of the employees in question, in no uncertain terms threatened, coerced or restrained them from carrying out those steps which they were prepared to take. But for the illegal actions of the Union, the employees in question would have returned to work and would not have suffered the lost wages for a period of ten weeks, which the Board, by its action, in effect leaves unresolved.

By sanctioning and giving its blessing to the Settlement Agreement in question, the Board disregarded the impact of the Union's conduct on the aggrieved employees albeit that it was as a direct result of such conduct that said employees endured the hardships of almost over two months of unemployment and lost earnings.

While the Board refers to its decision in Union de Tronquistas de Puerto Rico, Local 901, etc. (Lock Joint Pipe & Co. of Puerto Rico), 202 NLRB 399, 82 LRRM 1525 (1973), to support its determination not to award back pay, we not only respectfully disagree with the majority decision in that case, but also believe that a contrary decision here would not be inconsistent with that decision but would rather further serve to effectuate the purposes of the Act.

In Lock Joint, the Board acknowledged its role as being designed to balance the effectiveness of a particular remedy against its consequences and it determined that where only

picket line misconduct had occurred, a back pay remedy was inappropriate. The instant matter far transcends mere picket line misconduct and rather goes to the very core of the protection of the individuals' Section 7 rights.

As the dissent in Lock Joint aptly pointed out:

> "Indeed, it is difficult to comprehend how making an employee whole for a loss of wages suffered because of the Union's unlawful activity in preventing employees from working is any less remedial or any more punitive or deterrent in effect than making an employee whole for loss of wages suffered when the employer would not allow him to work because of the Union's unlawful activity ... Indeed, a back pay remedy is necessary to remove the effect of the Union's unlawful conduct and thereby effectuate the problems of the Act." (Lock Joint, supra, at 1529)

The Board's authority to issue a back pay order to remedy union conduct which was in violation of Section 8(b)(1)(A) of the Act has been approved by the 6th Circuit in National Cash Register Co. v. N.L.R.B., 466 F.2d 945 (CA 6, 1972), cert. denied 410 U.S. 966 (1973), where the Court found that the Board's broad remedial powers were sufficient to warrant the awarding of back pay. There, as here, the union's discriminatory conduct was the direct cause of the employees' loss of wages. The Court held that, under these circumstances, it was clearly proper for the Board to effectuate the policy of the Act by implementing a make whole remedy. National Cash Register, supra.

The facts of this case clearly reveal that the affected employees' sole loss was the significant wages of which they were deprived during the ten-week strike and, therefore, the only appropriate remedy which implements and effectuates the purposes of the Act is the awarding of back pay to compensate the injured

employees and to redress the harm done.

Finally, the Board's contention that the First Circuit's decision in N.L.R.B. v. O.C.A.W., 476 F.2d 1031 (CA 1, 1973), is "on all fours with the case at Bar" is inaccurate. (See, Board's Brief, p. 44.) There, as in other cases where the Board refused to provide a back pay remedy against the Union, the conduct complained of consisted of picket line misconduct. Here, however, the Union's actions extended into the rather sensitive area dealing with an individual's right and decision to either resign from or remain part of the Union. We submit, without agreeing to the propriety of the Board's interpretation of what is an appropriate remedy for picket line misconduct, that the Union's conduct here removes it from the realm of prior Board decisions and, therefore, warrants the imposition of a back pay remedy.

Although the Board has failed to consistently provide for back pay against Unions, we do not believe that such a remedy is properly labeled as "unusual" as the Board here contends. It is within the Board's power to impose such a remedy, the propriety of which has been previously judicially recognized. National Cash Register, supra.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the Board's application for enforcement be denied in Case No. 75-4018 and Case No. 75-4045 and that the Petition of Gleason and Garlick for Review of the Board's Order in Case No. 75-4047

be granted and that said Order be set aside.

Respectfully submitted,

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STATE OF NEW YORK )
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th Rd MASPETH, N.Y.

That on the 28 day of JULY, 1975, deponent personally served the within BRIEF FOR MARTIN A. GLEASON INC. & GUTTERMAN FUNERAL HOMES INC. RESPONDENTS and M. GARICK FUNERAL HOMES INC & MARTIN A. GLEASON PETITIONERS upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

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Robert La Grassa

Sworn to before me this
28 day of July, 1975

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1976